

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

76-2024

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-2024

UNITED STATES OF AMERICA,

Appellee,

- against -

CARMINE J. PERSICO, JR., et al,

Defendants,

CARMINE J. PERSICO, JR.,

Appellant.

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On Appeal From the United States District Court
for the Eastern District of New York

REPLY BRIEF FOR CARMINE J. PERSICO, JR.

ROSENBERG, ROSENBERG & ROCKMAN
Attorneys for Appellant
200 Garden City Plaza
Garden City, New York 11530
(516-248-4300)

MARC A. ROSENBERG
JOSEPH B. EHRLICH
Of Counsel

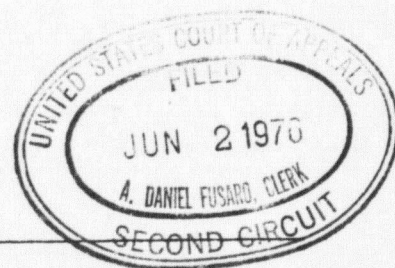


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REPLY BRIEF FOR CARMINE J. PERSICO, JR.

Carmine J. Persico, Jr. was sentenced on June 6, 1969, to a period of incarceration of fourteen years pursuant to Title 18 United States Code Section 4208(a)(2). Consequently, Mr. Persico with reference to his parole process was entitled, and the United States Board of Parole was obligated, to give him serious and meaningful parole consideration at or before the one-third point of his sentence, and that his institutional performance and conduct be given due effect in determining whether parole be granted, Grasso v. Norton, 520 F. 2d 27 (2d Cir. 1975). Such mandatory consideration reflects the Congressional

intent in the enactment of the statute under which Mr. Persico has been incarcerated. Once the sentencing judge makes the "significant" decision to sentence a defendant under Section 4208(a)(2), both the Court and the United States Board of Parole are bound to respect the intent of Congress as expressed in Section 4208(a)(2). See Grasso v. Norton, supra, 520 F. 2d 27, 33, 39.

Any claim that affects the essence of the sentence imposed under Section 4208(a)(2) may be brought by vehicle of Title 28 United States Code Section 2255. Appellant's main brief sets forth the totality of the facts and circumstances which in whole denied him due process, and evidences the systematic disregard of early release possibilities of Section 4208(a)(2). Resultantly, inasmuch as Mr. Persico's treatment has been abusive of the Congressional intent and mandate under 18 U.S.C. § 4208(a)(2), pursuant to which his sentence was imposed, relief is most proper under 28 U.S.C. § 2255. In Andrews v. United States, 373 U.S. 334, 339, it was stated:

"Under § 2255 a petitioner may 'move the court which imposed the sentence to vacate, set aside or correct the sentence.' And in response to such a motion a District Court is expressly authorized to 'discharge the prisoner

or resentence him or grant a new trial or correct the sentence as may appear appropriate (footnotes omitted)."

The Section 4208(a)(2) requirements have been disregarded; Title 28 United States Code Section 2255 permits the Court to consider the totality of abusive circumstances surrounding Mr. Persico's continued incarceration beyond Parole Board guidelines, and disregard of the mainstay elements of Section 4208(a)(2). See Kortness v. United States, 514 F. 2d 167 (8th Cir. 1975); United States v. Slutsky, 514 F. 2d 1222 (2d Cir. 1975); United States v. Randle, 408 F. Supp. 5 (N.D. Ill. 1975). Mr. Persico's "criminal past and history" * were before the sentencing court; the Section 4208(a)(2) sentence prohibits reliance on such factors as the basis for preclusion of parole. Mr. Persico's past is beyond his power to amend. His institutional performance and conduct is totally in accord with early release. His maintenance beyond the Parole Board's own guidelines (which take into effect the nature and severity of the offense), under the facts and

* Such factor is taken into account in the computation of a prisoner's salient factor score.

circumstances, is reprehensible and cannot be countenanced by a court of law bound to respect the Congressional intent under Section 4208(a)(2). The distortion and disregard of the Section 4208(a)(2) requirements make (a)(2) consideration impossible; makes compliance with the mandate and intent of Congress hopeless. Careful perusal of the facts and circumstances of parole considerations afforded (and not afforded) to appellant clearly show denial of essential due process; clearly evidence that the relief requested is fully proper and meritorious.

CONCLUSION

THE RELIEF REQUESTED IN APPELLANT'S
MAIN BRIEF TO THIS HONORABLE COURT
SHOULD BE IN ALL RESPECTS GRANTED.

Respectfully submitted,

ROSENBERG, ROSENBERG & ROCKMAN
Attorneys for Appellant

MARC A. ROSENBERG
JOSEPH B. EHRLICH
Of Counsel